(19,072.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 118.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

AUGUST HASSE AND —— HASSE, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff and Respondent,
vs.
AUGUST HASSE and —— HASSE, His Wife, Defendants and Appellants. } No. —.

Transcript on Appeal from the Superior Court of Kittitas County, State of Washington.

No. 2892.

Filed Jun- 3, 1901.

C. S. REINHART, *Clerk.*

2 In the Superior Court of the State of Washington in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE and —— HASSE, His Wife, Defendants. } # 2892. Complaint.

The plaintiff complains of the defendant- and for cause of action alleges:

I.

That at all the times hereinafter mentioned the plaintiff was and is a corporation duly organized under and by virtue of the laws of the State of Wisconsin, and duly authorized to do business in the State of Washington by reason of having complied with the laws of said State in relation to foreign corporations, and now engaged in the operation of a railroad in said State of Washington and elsewhere.

II.

That at all the times hereinafter mentioned defendants were and now are husband and wife.

III.

That at all the times hereinafter mentioned plaintiff was and now is the owner of and entitled to the immediate possession as a part of its right of way of the following described land and premises situated in Kittitas county, Washington:

That portion of the right of way which is 400 feet in width, being two hundred feet on each side of the center line of the main track, of the railroad of this plaintiff as the same is now located, constructed and operated across the northwest quarter of section
3 four, township nineteen, N. R. 16 east W. M., lying between lines five and one half feet from the center of the main track on the north side and five and one half feet from the center of the side track on the south side, and the right of way boundary lines and extending westerly a distance of 1410 feet from a point sixty feet east of the east switch at the station of Teanaway, being in the N. W. ¼ of section 4, township 19, N. R. 16 east W. M.

IV.

That the title and the right of the plaintiff to said right of way is by virtue of a statute of the United States to be found in 13th Statutes at Large, page 365, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," and the construction of a railroad across said premises under and by virtue of said act, whereby said premises were granted to the Northern Pacific Railroad Company, and this plaintiff is now the successor in interest to said premises and the title thereto has by various conveyances passed from said Northern Pacific Railroad Company to this plaintiff.

V.

That heretofore, and on or about the first day of September, 1896, defendants unlawfully entered into possession of said described property and premises, and ever since have, and do now unlawfully withhold the possession thereof from the plaintiff.

VI.

That the value of the use and occupation of said premises during the time the same have been so wrongfully and unlawfully withheld from plaintiff is the sum of fifty dollars.
4 Wherefore plaintiff asks judgment that it be restored to the possession of said premises, and that it do have and recover of and from the defendants said sum of fifty dollars, together with its costs and disbursements of this action.

C. B. GRAVES,
Ellensburg, Wash.
CROWLEY & GROSSCUP,
Headquarters Building, Tacoma, Washington,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Thomas Cooper being first duly sworn says that he is the statutory agent of The Northern Pacific Railway Company the plaintiff in the above action; that said company is a foreign corporation and affiant makes this verification for and on its behalf, and is authorized so to do; that he knows the contents of the foregoing complaint and the same is true as he verily believes.

THOMAS COOPER.

Subscribed and sworn to before me this 8th day of June, 1900.

A. G. AVERY,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

[SEAL.]

(Filed June 11, 1900.
H. W. HALE, *Clerk.*)

In the Superior Court of the State of Washington in and for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE ET AL., Defendants. } 2892. Answer.

Now comes the defendants in the above entitled cause and for answer to the complaint of plaintiff filed herein denies each and every allegation in said complaint contained.

And further answering and for their first affirmative defense, allege:

1st. That, the defendant August Sasse has ever since the 24th day of May 1883, and for more than sixteen years last past, and until the commencement of plaintiff's said action, held the notorious, absolute, uninterrupted, continuous, adverse and hostile possession under color of title and claim of right to all and every part of the lands alleged in plaintiff's complaint in this action to be wrongfully held by him, and plaintiff's cause of action is barred by lapse of time and no recovery can be had thereunder.

And for their second affirmative defense these defendants allege:

1st. That at the time the Northern Pacific Railroad Company surveyed and constructed their line of railroad over, through and across the lands described in plaintiff's complaint herein, the defendant August Hasse was in the actual possession of and owned, occupied and had enclosed all of said lands with a fence and was improving and cultivating the same, and the said Northern Pacific Railroad Company wrongfully and without the consent, but against the will and wish of said defendants and without obtaining
6 from said defendant any right so to do, and without compensation therefor or offering any compensation therefor, and

without any condemnation proceedings for said right-of-way or to the improvements and cultivated fields of said defendant, but said railroad company did with force and violence and with a great crowd of men, break down the fences enclosing said land and enter upon the same and constructed said railroad across the cultivated, improved and enclosed lands of said defendant, and neither the Northern Pacific Railroad Company nor the plaintiff herein has ever compensated nor offered to compensate said defendant for said right-of-way, nor the injury to his improvements *to his improvements* and growing crops by reason of the construction of said railroad across his said lands, and no more of said land has ever been in the possession of nor occupied by said Northern Pacific Railroad Company nor said plaintiff than that part and portion occupied at the time said railroad was constructed, which includes the road-bed and the ditches on each side thereof, and said defendant has always, since the construction of said railroad across said land, without let or hinderance, cultivated and improved, occupied and had the exclusive uninterrupted, continued and adverse possession of all the remaining portions of said land, and said plaintiff is by his said action endeavoring to dis-possess defendant from a strip of land two hundred feet in width on each side of the center of the main track of said railroad across said land, not being content with the said road-bed and the ditches on each side thereof said plaintiff seeks in this action to oust defendant from the possession of all of said lands within two hundred feet on each side of the center of said railroad as it is now operated over and across said lands, but said defendant avers that by reason of said wrongful acts of said Northern Pacific Railroad Company hereinbefore set up, this plaintiff can
7 claim no right to any of the lands claimed in its complaint as being wrongfully held by this defendant.

Wherefore, the defendants pray that plaintiff take nothing by his said action, and that these defendants recover their costs and disbursements in this action.

PRUYN & SLEMMONS,
Attorneys for Defendants.

STATE OF WASHINGTON, }
County of Kittitas, } *ss:*

August Hasse being first duly sworn says; that he is one of the defendants named in the foregoing answer; that he has heard the same read, knows the contents thereof and believes the same to be true.

____ ____.

Subscribed and sworn to before me this 15th day of September, 1900.

____ ____,
Justice of the Peace, Ellensburg Precinct,
Kittitas County, Washington.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

August Hasse being first duly sworn says that he is one of the def'ts named in the foregoing answer that he has heard the same read knows the contents thereof and believes the same to be true.

AUGUST HASSE.

Subscribed and sworn to before me this 15 day of Sept. 1900.

JAS. G. BOYLE,
Justice of the Peace, Ellensburg Precinct,
Kittitas County, Washington.

Indorsed on back: Service accepted and copy received this 21st day of Sept. 1900. Carroll B. Graves of att'ys for pl'ff. Filed Sep. 21 1900 H. W. Hale, clerk.

8 In the Superior Court of the State of Washington in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
AUGUST HASSE ET AL., Defendants. } # 2892. Reply.

Comes now the plaintiff, and for reply to the answer of the defendants herein says:

I.

The plaintiff replying to the "first affirmative defense" set forth in said answer, denies the same, and each and every allegation therein contained.

II.

The plaintiff replying to the "second affirmative defense" set forth in said answer, denies the same, and each and every allegation therein contained.

Wherefore the plaintiff demands judgment in accordance with the prayer of its complaint herein.

CROWLEY & GROSSCUP,
Attorneys for Plaintiff.

17 N. P. General Office bldg., Tacoma, Pierce county, Wash.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Thomas Cooper, being first duly sworn, on oath says: That he is the statutory agent of the plaintiff herein in the State of Washington; that he has read the foregoing reply and knows the contents thereof, and believes the same to be true; that the plaintiff herein is a foreign corporation, and that he makes this verification for and in its behalf, and that he is authorized so to do.

THOMAS COOPER.

Subscribed and sworn to before me this 5th day of October, A. D. 1900.

[SEAL.] A. G. AVERY,
Notary Public, Residing at Tacoma, Washington.

Indorsed on back: Due service of within reply by receipt of a true copy thereof admitted this 8th day of Oct. 1900. Pruyn & Slemmons attorney- for def't. (Filed Oct. 9, 1900, H. W. Hale, clerk.)

9 In the Superior Court of the State of Washington in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
v.
AUGUST HASSE and WIFE, Defendants. } #2892. Judgment.

This cause coming on regularly for trial before the court and a jury on the 22nd day of November, 1900, the plaintiff appearing by its attorneys, Messrs. Crowley & Grosscup, and the defendants appearing by their attorneys, Messrs. Pruyn & Slemmons; and the plaintiff having introduced its evidence herein and rested, and the defendants having introduced their evidence herein and rested;

Thereupon the plaintiff moved the court upon said evidence to take the case from the jury and render judgment in favor of the plaintiff as a matter of law. And thereupon, the court, finding that there was no disputed fact in evidence, and that the decision of said case was a matter of law, depending entirely upon said fact, dismissed the jury from further consideration of the case, and reserved his decision as to the law.

And the court having now duly considered said facts and evidence, and being fully informed in the premises, and finding as a matter of law that the plaintiff is entitled to judgment in accordance with its complaint herein,

It is therefore considered, ordered and adjudged that the plaintiff is the owner of and entitled to the immediate possession as a part of

its right-of-way of the following described land and premises situated in Kittitas county, Washington:

"That portion of the right-of-way which is 400 feet in width, being two hundred feet on each side of the center line of the main track of the railroad of this plaintiff as the same is now located, constructed and operated across the north-west quarter of section four, township nineteen, N. R. 16 east W. M.., lying between lines five and one-half feet from the center of the main track on the north side and five and one-half feet from the center of the side track on the south side, and the right-of-way boundary lines and extending westerly a distance of 1410 feet from a point sixty feet east of the east switch at the station of Teanaway, being in the N. W. ¼ of section 4, township 19, N. R. 16 east W. M." and that said property constitutes and is a part of the right-of-way of the Northern Pacific Railway Company, derived under a grant of the United States of America to be found in 13 Statutes at Large, page 365, approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," and acts amendatory thereof and supplemental thereto.

It is further ordered that the defendants and each of them be and they are hereby required to surrender and deliver possession of said premises to the plaintiff, and that the plaintiff may have a writ of restitution therefor.

JOHN B. DAVIDSON, *Judge.*

Ent. in Journal 12, p. 255.

(Filed Jan. 11, 1901
H. W. HALE, *Clerk.*)

$30.40
Ex. D. 2—610.

In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* AUGUST HASSE ET UX., Defendants.	No. 2892. Exceptions to Findings and Judgment of Court.

Now comes the defendants in the above entitled action and except to the finding and judgment of the court which has been filed without paragraphing or numbering, and signed by the court on the 11th day of January 1901 and the defendants' exceptions are to each and every part thereof, and to the whole thereof because the same and no part thereof is supported by the evidence but is contrary thereto.

And said defendants except to the judgment of the court rendere herein because the same and every part thereof is contrary to la and is not founded upon a legal conclusion or conclusions from th facts proved, and because the judgment of the court upon the fac proven should have been in favor of the defendants and against th plaintiffs.

PRUYN & SLEMMONS,
Attorneys for Defendants.

Due and legal service of the above exceptions to findings an judgment of the court in the above entitled cause accepted and cop received this 12th day of January 1901.

CARROLL B. GRAVES,
Of Attorneys for Plaintiff.

(Filed Jan. 12 1901
H. W. HALE, *Clerk.*)

12 In the Superior Court of the State of Washington in and fo the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, vs. AUGUST HASSE and —— HASSE, His Wife, Defendants.	No. 2892. Findings Fact and Conclusio of Law.

Come now August Hasse and —— Hasse, his wife, the defen ants above named, and propose the following findings of fact an conclusions of law, and request the court to make and find the sam before any findings of fact or conclusions of law are made or foun by the court.

The court from the evidence in this case finds the following fact to-wit:

1st. That the defendant August Hasse and —— Hasse are hu band and wife.

2nd. That the defendant August Hasse settled upon the tract land, a portion of which is in controversy in this action, and mad homestead application therefor on May twenty fourth 1883. Th said defendant made final homestead proof on July 12th, 1888, an patent issued from the United States therefor to August Hasse on of the defendants herein on September 20th, 1889.

3rd. That the defendant August Hasse and his wife and famil have ever since said settlement in 1883 lived upon said tract land, and they enclosed the same with a fence in 1883 and con structed thereon a dwelling house and other buildings, and cult vated and improved the portion of land in controversy in this actio and for more than fifteen years preceding the bringing of plaintiff

action said defendants held the notorious, exclusive, absolute,
13 uninterrupted, continuous, adverse and hostile possession under color of title and claim of right to all and every part of the land alleged in plaintiff's complaint to be wrongfully withheld by these defendants from the plaintiff in this action.

4th. That in the year 1886 the Northern Pacific railroad surveyed their line of railroad through said premises, and during said year said railroad company did with force and violence and with a great crowd of men break down the fences enclosing said land and enter upon the same and constructed said railroad across the cultivated improved and enclosed lands of said defendants without the permission of this defendant and against his will and wish, and without compensating him for the injury to the improvements and cultivation of said lands, or without condemning the same for their right of way, and have ever since occupied five and one half feet from the center of the main track on the north side and five & one half feet from the center of the side track on the south side and no more; and plaintiff sought in this action to eject the defendants from all the land that the defendants occupied within two hundred feet on each side of the center line of the main track of the Northern Pacific railroad where it runs through the defendants' said land.

5th. That the plaintiff's grantors, The Northern Pacific Railroad Company previous to the year 1886 never had designated, marked out nor located their right of way granted them by act of Congress approved July 2, 1864 through or across or in the neighborhood of the lands in controversy.

6th. That said Northern Pacific Railroad Company nor the grantee herein has never occupied any other portion of said tract of land than in these findings set out, and the defendants have always maintained an enclosure around the same, and the Northern Pacific Railroad Company and this plaintiff have always maintained cattle guards where their line runs through the outside fences of said tract.

14 *Conclusions of Law.*

And the court finds as conclusions of law:

1st. That the plaintiff's cause of action is barred by the statute of limitation.

2nd. That the Northern Pacific Railroad Company's grant of right of way approved by Congress July 2, 1864 not having been then designated, located and marked out by said company before the defendants settled upon, fenced and improved the lands in controversy and obtained a homestead filing thereon, they had no right by virtue of their grant of right of way to forcibly intrude upon the enclosed and cultivated fields of another without compensating the defendants therefor, and they cannot now claim the full width of their grant of right of way over said tracts of land by virtue of their forcible trespass thereon in locating the same; and if said company

or its grantees and successors in interest desire to use any more of said lands for railway purposes they must condemn the same and pay the defendant compensation therefor before taking the same.

3rd. That plaintiff is entitled to take nothing by his said action, and defendants recover their costs.

Done in open court this 10th day of January 1901.

—— ——, *Judge.*

(Filed Jan. 12th, 1901
H. W. HALE, *Clerk.*)

The above and foregoing proposed findings of fact and conclusions of law were presented, proposed and requested by defendant immediately after the decision of the court and the court refused to make the foregoing findings of fact or conclusions of law or either of them, to which refusal defendants excepted and exception was allowed.

Defendants specially excepted to the failure of the court to find each of said proposed findings of fact and each of said proposed conclusions of law, which exceptions were allowed by the court.

Dated this 10th. day of January 1901.

JOHN B. DAVIDSON, *Judge.*

Ent. in Journal 12, p. 257.

(Filed Jan. 12, 1901
H. W. HALE, *Clerk.*)

15 In the Superior Court of the State of Washington in and for the County of Kittitas.

THE NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* AUGUST HASSE and —— HASSE, His Wife, Defendants.	No. 2892. Notice of Appeal to the Supreme Court.

To said plaintiff, the Northern Pacific Railway Company, or C. B. Graves and Crowley and Grosscup, their attorneys of record:

You and each of you are hereby notified that August Hasse and —— Hasse, his wife, defendants in the above entitled action hereby appeal the above entitled cause to the supreme court of the State of Washington from that certain judgment rendered and entered against them in said superior court in said action on the 11th day of January A. D. 1901. And said appeal is taken from the whole of said judgment and every part thereof.

Dated February 23rd. 1901.

PRUYN & SLEMMONS,
Attorneys for Defendants.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

I hereby accept due and legal service of the foregoing and annexed notice of appeal to the supreme court in the above entitled cause, and acknowledge the receipt of a copy of said notice, this 23rd day of February A. D. 1901.

C. B. GRAVES,
Of Attorneys for The Northern Pacific Railway Company, Plaintiff.

(Filed Feb. 23 1901
H. W. HALE, *Clerk.*)

16 In the Superior Court of the State of Washington in and for Kittitas County.

THE NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE and —— HASSE, His Wife, Defendants.
} No. 2892. Appeal Bond.

Know all men by these presents that August Hasse and —— Hasse his wife as principals and Henry Rehmke as surety are held and firmly bound unto The Northern Pacific Railway Company, plaintiff in the above entitled action in the penal sum of two hundred dollars ($200.), for the payment of which said sum well and truly to be made we bind ourselves and each of ourselves, our heirs and each of our heirs, executors, administrators and assigns, firmly and jointly and severally by these presents.

The condition of this obligation is such that, whereas, the above bounden principals have appealed the above entitled cause to the supreme court of the State of Washington,

Now therefore, if the above bounden principals, appellants shall well and truly pay all costs and damages that may be awarded against them or either of them on said appeal, or on the dismissal thereof, not exceeding the sum of two hundred dollars, then this obligation to be void, otherwise to remain in full force, virtue and effect.

In witness whereof we have hereunto set our hands and seals this 23rd day of February A. D. 1901.

AUGUST HASSE AND
—— HASSE, *Defendants,*
By PRUYN & SLEMMONS,
Their Attorneys,
Principals.
HENRY REHMKE, *Surety.*

17 STATE OF WASHINGTON, } ss:
County of Kittitas, }

Henry Rehmke being first duly sworn according to law deposes and says: That he is the person signing the foregoing bond as surety therein; that he is a resident of the State of Washington and is worth the sum of two hundred dollars over & above all his debts and liabilities in property within this State exclusive of property exempt from execution.

HENRY REHMKE.

Subscribed & sworn to before me this 23rd day of February A. D. 1901.

JAS. G. BOYLE,
Notary Public.

[SEAL.]

Residing at Ellensburg, Wash.

(Filed Feb. 23, 1901.
H. W. HALE, *Clerk.*)

18 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE and —— HASSE, His Wife, Defendants.
} # 2892. Clerk's Certificate.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

I, H. W. Hale, county clerk and *ex-officio* clerk of the superior court of Kittitas county, State of Washington, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I am directed by appellants to transmit to the supreme court of the State of Washington.

Witness my hand and official seal affixed this 29th day of May, A. D. 1901.

[SUPERIOR COURT SEAL.] H. W. HALE, *Clerk.*

(See table.)

19 Description of tract.				Contents.		Rate per acre.		Purchase money.		Name of the purchaser
Part of section.	Section.	Township.	Range.	Acres.	100ths.	Dollars.	Cents.	Dollars.	Cents.	
Home., N. W. ¼.....	4	19 N.	16 E.	163	53	2	50	10	00	August Hasse.....
Or properly described as lots 3 and 4 and S. ½ of N. W. ¼..	"	"	"	See	excess rece-pt No. 81.					
Lot No. 4 of the	above	h'd en	try was	volun	tar-y relinquished to	the Unite	d States	by August	Hasse o	n July 29th, 1885.
Receiver's receipt for S. ½ of N. W. ¼ and lot No. 4	4	19 N.	16 E.	121	64	2	50 to	August H	asse of	Teanaway, Wash.

I, Walter J. Reed,—register of the United States land office at North Yakima, Washington hereby certify that the foregoing is a true and correct copy of page No. 26, of
Showing the record and status or condition of the south half, north west quarter and lot number three, in section No. four, in township number nineteen, north range sixte
required by law to be kept in my office for such purpose, and said copy is as full and complete as the same appears in my office.
In witness whereof, I have hereunto set my hand on this 10th day of November, 1900.

Endorsement: #2892. 3953 Filed Jun. 3 1901. C. S. Reinhart, clerk. #2892. Def'ts' Ex. 1. N. P. Ry. Co. *vs.* August Hasse *et ux.* 11/22/00. U. S. land office, North Y
Hasse Especially to the portion made proof on and for which patent has been issued to August Hasse for S. ½ of N. W. ¼ and lot No. 3,—sec. 4, tp. 19 N. R. 16 E. W. M.

Contents.		Rate per acre.		Purchase money.		Name of the purchaser.	Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded.	
...s.	100ths.	Dollars.	Cents.	Dollars.	Cents.						Volume.	Page.
163	53	2	50	10	00	August Hasse.....	May 24th 1883	159				
...ee	excess rece-pt No. 81.											
...n n	tar-y relinquished to	the Unite	d States	by August	Hasse o	n July 29th, 1885.						
121	64	2	50 to	August H	asse of	Teanaway, Wash.	July 12th 1888	234	August Hasse.....	Sept. 26, 1889	1	205

...hington hereby certify that the foregoing is a true and correct copy of page No. 26, of Tract Book No. 5, upon which page and in which book, are kept all entries and notations. ... number three, in section No. four, in township number nineteen, north range sixteen, east of the Willamette meridian, Washington. And that the aforesaid book is a book ...plete as the same appears in my office.
...0.

WALTER J. REED,
Register United States Land Office, North Yakima, Wash.

...ts' Ex. 1. N. P. Ry. Co. *vs.* August Hasse *et ux.* 11/22/00. U. S. land office, North Yakima, W. Nov. 10, 1900. Abstract from the records of the status of the h'd E. of August ... August Hasse for S. ½ of N. W. ¼ and lot No. 3,—sec. 4, tp. 19 N. R. 16 E. W. M.

20 In the Superior Court of the State of Washington in and for Kittitas County.

THE NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE ET AL., Defendants.

No. 2892. Notice of Filing Proposed Statement of Facts.

To The Northern Pacific Railway Company, the above named plaintiff, and Crowley and Grosscup and C. B. Graves, their attorneys of record:

You and each of you are hereby notified that the above named defendants August Hasse and —— Hasse have prepared and filed in the office of the clerk of the above named court a proposed statement of facts in the above entitled action, and herewith serve you with a copy of said proposed statement of facts after the same has been filed as aforesaid, with a copy of the file mark thereon, which said proposed statement of facts is so filed in the office of said clerk on the 5th. day of February 1901.

PRUYN & SLEMMONS,
Attorneys for Defendants.

Service of the above and foregoing notice and a copy of the proposed statement of facts filed as above set forth, is hereby admitted and accepted.

Dated at Ellensburg Washington this 5th. day of February 1901.

CROWLEY & GROSSCUP &
C. B. GRAVES,
Attorneys for Plaintiff.

Endorsement: # 2892. Filed February 5, 1901, H. W. Hale, clerk.

21 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE ET UX., Defendants.

No. 2892. Statement of Facts.

The above entitled case was tried before a jury in the superior court aforesaid, and it appearing to the court that there was no conflicting evidence in the trial of said cause, the court took the case from the jury and held under advisement until the 11th. day of January 1901, when the said court rendered a judgment in favor of plaintiff, to the rendition of which judgment the defendant- by their

counsel then and there excepted, which exception was then and there allowed.

That defendant- introduced in evidence as part of their case certified copy of the records of the United States Land Office relative to the land in controversy in this action. That said instrument is marked "Defendants' Ex. No. I," and is now on file in the office of the clerk of said superior court, and will be annexed hereto before the signing and certifying of this statement of facts.

That the defendant introduced in evidence on the trial of said cause a patent from the United States to him for the land in controversy, which patent bears date September 27, 1889, and is now on file in the office of the clerk of said superior court, and will be annexed to and made a part of this statement of facts before the same is certified to by the judge who tried said cause. an- marked Defendants' Exhibit "2."

That a copy of the findings of fact and conclusions of law proposed by the defendant- and refused by the court in said cause are annexed hereto and made a part of this statement of facts, which were filed and served upon plaintiffs on the 12th. day of January 1901.

That plaintiff's exceptions to the findings of fac' and judgment of the court were filed and served on the 12th. day of January 1901, a copy of which is annexed hereto and made a part of this statement of facts.

That, following is the full and complete evidence given by all the witnesses produced and sworn on the trial of said cause.

22 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HESSE ET UX, Defendants.

Equity cause, tried before Judge Jno. B. Davidson and jury, Thursday, November 22nd, 1900, 3 p. m.

Appearances: Graves & Englehart and A. G. Avery, for plaintiff, Pruyn & Slemmons, for defendants.

Testimony.

Mr. AVERY states following stipulation:

It is stipulated and agreed by and between the parties to this action in open court, that at all the times mentioned in the complaint, the plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and duly authorized to do business in the State of Washington, by reason of having complied with the laws of said State in relation to foreign corporations, and is now engaged in the operation of a railroad in said State of Washington and elsewhere. (Reads 1st paragraph of complaint.)

It is also stipulated that at all the times in the complaint mentioned, the defendants were and now are husband and wife.

It is further stipulated, that under and by virtue of an act of Congress, approved July 2nd, 1864, entitled an "Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," the Northern Pacific Railroad Company was granted a right
23 of way 400 feet in width, being 200 feet on each side of the center line of the main track of said railroad as the same might pass through the public domain, and that at said date the land mentioned in the complaint was vacant public land of the United States and constituted a part of the public domain; that under and by virtue of said act and in accordance therewith, the Northern Pacific Railroad Company in the year 1886, or thereabouts entered upon and constructed a line of railroad across the north-west quarter of section 4, township 19 north, range 16 east of the Willamette meridian; that under and by virtue of authority granted by a joint resolution of Congress, approved March 1st, 1869, all the railroad line and property of the Northern Pacific Railroad Company, including its railroad located across the land mentioned in the complaint, was mortgaged to the Farmers Loan and Trust Company; that thereafter, said mortgage was duly foreclosed and the sale of all the property therein described was ordered to be made by Alfred L. Carey, as special master appointed for that purpose; that thereafter all of said land, railroad rights of way and property, including the property described in the complaint, was duly and regularly sold in accordance with the decree of foreclosure, and a deed thereafter executed by the said Alfred L. Carey as special master, dated August 18th, 1896, and delivered to the Northern Pacific Railway Company, the said deed being executed in favor of said company; that on the 15th day of October, 1896, the Northern Pacific Railroad Company duly executed and delivered to the Northern Pacific Railway Company a deed conveying all its right, title and interest in and to the lands, owned, used and occupied by it for railroad purposes, including the property mentioned in the complaint; that on the 16th day of October, 1896, the Farmers Loan and Trust Company duly executed and delivered to the
24 Northern Pacific Railway Company a deed conveying to said company, all of its right, title and interest in and to all the property theretofore mortgaged by the Northern Pacific Railroad Company to it, including the property mentioned in the complaint; that on the 30th day of October, 1896, E H. McHenry and others, being the duly and regularly appointed receivers of the Northern Pacific Railroad Company, executed and delivered to the Northern Pacific Railway Company, a deed conveying all their right, title and interest in and to the property of the Northern Pacific Railroad Company in their charge and possession as such receivers, including the property described in this complaint;

Mr. PRUYN: That the following allegation is made a part of de-

fendants' answer and it is so stipulated, by the parties, to-wit: That defendant, August Hesse claims to own the premises described in plaintiff's complaint by virtue of a homestead application filed May 24th, 1883, and final proof made therein on July 12th, 1888, and by patent issued to him by the United States, bearing date of September 27th, 1887.

Mr. AVERY: That it is further stipulated, that ever since the location and construction of said railroad across the premises mentioned in the complaint, the same has been continuously operated as a railroad across the same by the Northern Pacific Railroad Company and its successors in interest, including the receivers of the Northern Pacific Railroad Company and the Northern Pacific Railway Company, and said Northern Pacific Railway Company is now operating said railroad and its successors in interest of said railroad company and said receivers.

It is further stipulated that the defendants in this case are now in possession of the following described premises situate in Kittitas county, Washington, to-wit: That portion of the right of way which is 400 feet in width being 200 feet on each side of the center line of the main track of the railroad as the same is now located, constructed and operated across the northwest quarter of section 4, township 19 north range 16 east of the Willamette meridian, lying between lines 5½ feet from the center of the main track on the north side and 5½ feet from the center of the side track on the south side and the right of way boundary lines and extending westerly a distance of 1410 feet from a point 60 feet east of the east switch at the station of Teanaway, being in the northwest quarter of section 4, township 19 north, range 16 east of the Willamette meridian, and that said defendants are now withholding the possession of said premises from the plaintiff.

After stating the above stipulation, plaintiff rests.

After statement of case to jury, Mr. Pruyn offers in evidence a certificate from the register of the land office at North Yakima, showing the part of tract book showing the entries in relation to this tract of land. Also offer in evidence patent signed by Benjamin Harrison, President, bearing date the 27th of September in the year 1889, and of the Independence of the United States the 114th.

Mr. Avery on the part of plaintiff objects to the offered evidence on the ground that the same is incompetent, irrelevant and immaterial in this action, the purport of the same being to deprive the railway company of a right of way granted to its predecessors in interest under and by virtue of an act of Congress of the United States, on the ground that said company has no right to alienate any portion of its right of way or property used in connection with its franchise, and cannot be involuntarily deprived of such right of way. Objection overruled. Exhibits received in evidence, certificate, Defendants' Exhibit "1" and patent Defendants' Exhibit "2."

26 NICK JUNGER, witness for defendants, being duly sworn, testified as follows:

Direct examination by Mr. PRUYN:

Q. What is your name?
A. Nick Junger.

Mr. Avery says the plaintiff desires to object to the introduction of any evidence tending to show any adverse possession of its right of way, on the same grounds made to the introduction of documentary proof. Same ruling by court.

Q. Are you acquainted with the August Hesse farm up near Teanaway, through which the Northern Pacific Railway Company operates a line of railroad?
A. Yes sir.
Q. You may state to the jury, when, if you know, Mr. Hesse settled there?
A. Well, the first I can remember is in the forepart of June '84.
Q. Well, was he settled upon that place at that time?
A. Yes sir.
Q. Did he at that time have any part of the land enclosed with a fence?
A. Well he had part of the land fenced.
Q. Did he have a house built on it?
A. Yes sir.
Q. Had he any of the land improved?
A. Yes sir.
Q. Did he cultivate any of it?
A. Yes sir.
Q. Now since that time, you may state whether that place has been occupied by Mr. Hesse?
A. It has most of the time that I know.
Q. You have been there since the railroad was constructed through there?
A. I was there before the railroad come through there.
Q. You have been there since?
A. Yes sir.
Q. Since that time, since the railroad was built through there, you may state whether the railroad company ever constructed a fence upon their right of way, including their right of way, did they ever fence the right of way any?

27 A. I never saw the railroad fence the right of way any, I never saw it fenced there.

Q. You may state whether or not Mr. Hesse has cultivated and improved and occupied that place ever since you saw him there in 1884?
A. He always lived on it as I know ever since '84, on his place.
Q. Do you know how near he cultivates to the railroad track?

A. Well I know he is always pretty close, close up, about 20 or 30 feet.
Q. Something like that?
A. Yes.

Cross examination by Mr. AVERY:

Q. Where is his house located with reference to the railroad track?
A. His house is on the north side of the railroad.
Q. How far?
A. Well, I cannot tell exactly how far, but may be 20 or 24 rods, may be a little bit more.
Q. Quite a little ways back from the track?
A. Yes.
Q. When you say Mr. Hesse has cultivated this land you mean he has farmed it?
A. Yes, plowed it.
Q. Farmed it in the usual way land is farmed, planting crops?
A. Yes.

Re-direct examination:

Q. When this railroad was built, did it run through the cultivated lands of Mr. Hesse?
A. Yes.
Q. And through the fence?
A. It must have run through the fence, because it was fenced up before the railroad come through.

Witness excused.

28 HENRY REHMKE, witness for defendants, being first duly sworn, testified as follows:

Direct examination by Mr. PRUYN:

Q. Mr. Rehmke, are you acquainted with the defendants in this case?
A. Yes sir.
Q. You may state if you are acquainted with the land in controversy in this action, place where they live up there?
A. Well, it was in '83——
Q. You are acquainted with it, are you?
A. Yes sir, I am.
Q. How long have you known that place?
A. I have known that place as long as I have been here in '83.
Q. Do you know about the time Mr. Hesse located on that place?
A. Yes sir.

Q. About what time was that?
A. It was May, '83.
Q. You may state what improvements, if any, he had there, if you know, at the time the railroad was built there through that place?
A. Well, he had a house there, some barns and a field.
Q. He had a fence around the field?
A. Fence around the field.
Q. Do you know whether or not the railroad when it was constructed, was constructed through that cultivated field—and across that fence?
A. Yes, it was constructed through the field and through the fence.
Q. Do you know whether or not there was cattle-guards——
A. There was cattle-guards placed where the fence was at that time.
Q. You may state whether or not the railroad company has ever fenced their right of way through there?
A. No, they have not.
Q. State if you know, how near the railroad track has Mr. Hesse cultivated these fields?
A. Oh, I should judge right up to the bank of the railroad track, 20 or 30 feet some places, some places not so near.
29 Q. Do you know whether or not Mr. Hesse has resided there continuously since '83?
A. Yes sir, he has, they built him a crossing across that track when they built the railroad so that he could cross it from one side to another.

No cross examination.
Witness excused.

AUGUST HESSE, defendant, being duly sworn, testified as follows:

Direct examination by Mr. PRUYN:

Q. Mr. Hesse, you are one of the defendants in this case?
A. Yes.
Q. Your wife is the other defendant?
A. Yes.
Q. Mr. Hesse, you may state to the jury at what time, if at any time, you settled upon the lands in controversy in this action?
A. I come there, I filed on my land the 24th of May in Yakima and I come back from Yakima about a week afterwards, I went up to Teanaway and went to building a house.
Q. What year?
A. 1883.
Q. Now at the time the Northern Pacific railroad built its line of road through there, how much improvements, if any, did you have on

that tract of land, how much did you have fenced, what buildings did you have on it and how much cultivated?

A. I had fenced between 30 and 40 acres, and I had well nearly five acres cultivated and sowed down in grain and when the——

Q. What houses?

A. I had a house, block house and a barn.

Q. Now was this house and barn, cultivated land enclosed with a fence at that time?

A. Inside of a fence.

30 Q. Now, do you recollect what year the railroad company constructed their road through there, you have stipulated here it was '86?

A. It must have been fall of '86.

Q. Where were you all the time they constructed their road, was you absent?

A. I was not there.

Q. Where was you?

A. I was down here getting up some provisions, of course I could not get any there up there, had to haul everything from Ellensburg.

Q. How long was you away from home at that time?

A. Must have been two or three days.

Q. When you left there, they had not constructed any railroad or anything?

A. No sir.

Q. When you come back, what did you find?

A. There was a right of way gang, they was sawing some trees down on both sides of the fences, and the fences were torn down.

Q. State whether or not the fences were broken down?

A. Both sides.

Q. And they were constructing a road through there, grubbing it out and constructing it?

A. Yes sir.

Q. Had you ever consented at that time for them entering upon those premises?

Mr. Avery for plaintiff objects as immaterial. If we have entered, we have entered by virtue of a right granted us. It makes no difference if the party in possession of land that belongs to us objects, we have a right to go in there, if we are committing a trespass, that trespass cannot be shown as any defense to that action.

Objection overruled for present.

Q. Had you at the time they had broke the fence and gone in there, had you consented for them to do so—at the time
31 they broke down that fence and went in there, you had never consented for them going through there.

A. No.

Q. Now, they never commenced any proceeding against you to condemn it, any legal proceeding in the courts?

A. No.

Q. They never paid you anything for the injury to your improvements there or anything?
A. No.

Mr. AVERY to court: It is understood that all this testimony goes in subject to our objection?
The COURT: Yes.

Q. Now, you say they constructed that road sometime in '86.
A. Yes.
Q. Now describe the character of that land, is it flat land?
A. Where they went through, pretty near flat.
Q. You may state whether they made much embankment or not going through there?
A. Oh, yes. A little rolling lower part of it.
Q. After the road was constructed in '86 how soon, if at any time, did the railroad company put in cattle guards, where they run through your fence?
A. The first cattle guards they put in was that fall.
Q. That fall?
A. In the fall.
Q. When did they put in the next one?
A. The next spring I commenced cultivating again and I told Mr.——
Q. When was it put in, when was the next one put in, what time?
A. Next spring.
Q. Have they maintained those cattle-guards ever since, kept up those cattle guards?
A. No, one time the fence burned down and I had to put it up myself.

Mr. Avery objects as immaterial.

Q. Now, since that time, since the railroad was built through there, he has cultivated and improved those lands?
A. I cultivate them.
Q. Has anybody been inside of those inclosures to cultivate or improve those lands?
32 A. No.
Q. You may state whether or not you have exercised the continuous control over those lands since that time?
A. I have had control over it always.
Q. Down to the present time?
A. Paid taxes for it.
Q. Paid the Government for it too?
A. Yes, I had to pay some extra in Yakima.
Q. Now, how close to the track does your cultivated lands lie?
A. Around one end a little nearer, about 18 or 20 feet, and the other end I guess about 25.
Q. How is it on the other side of the track?
A. Both sides the same way.

Q. You may state to the jury how you have done with those lands down to these ditches since the railroad has been build in regard to plowing?

A. I plow it to the ditches just as tight as I could, one end of course was high, and it did not scrape up nearer, and I plow a little nearer.

Q. Has anybody attempted to prevent you from cultivating those lands?

A. No.

Q. Has anybody raised an objection to your occupying those lands?

A. No.

Q. You may state if you have made your home there continuously all the time?

A. I have been there, made it my home ever since I have been there.

Q. Has anybody else been there?

A. Not anybody that I know of.

Cross examination by Mr. AVERY:

Q. Mr. Hesse, how far back are your houses from the track?

A. My house is about—over 400 feet.

33 Q. You never had any trouble with the railroad company?

A. No, I never, the first time I stopped them building a sidewalk.

Q. They never tried to put you out of the land?

A. Oh no, they never tried to put me out.

Q. You simply plowed the land and farmed it?

A. Yes.

Q. And you went up about as close to the track as you could, so as not to interfere with the railroad track?

A. No, I tried to get as close in as I could.

Q. You have been speaking about cattle-guards, they were placed on the outer limits of your land where the fence went through?

A. On the line, one side was a little more inside, not quite on the line either.

Q. Not on the line?

A. A little more inside.

Re-direct examination:

Q. Mr. Hesse, did the Northern Pacific Railroad Company ever fence in their right of way through your land?

A. No.

Q. Did they ever mark it out in any way to your knowledge?

A. Never did.

Q. All this time since before they entered upon this land down

to the present time, you may state whether you have maintained a fence around those premises continuously all the time?

A. Yes.

Q. You may state whether that has been a good substantial fence, such as would turn stock, the first time and all the time.

A. Well, it was a good stock fence, turn stock.

Q. In answer to the question of counsel, you said something about their trying to build a side track, and you drove them out and would not let them in?

A. Yes.

Q. What was that?

A. It was something like a year ago, they come in there
34 with men and teams broke the fence and commenced plowing, and I told my wife to watch it and I knew they was building a side track, and I told my wife. I was not there, my wife saw them coming in and she went out and closed it, the boss of the gang and Mr. John Taylor with the scraper, they come and hunted me up and asked me if it was my will to stop it and he said Come over here, I show you how far we go and I went over there and they show me how broad and how long and I said No, and the boss said Get out of here and shut up the fence, and so the road master come and the road master reported it to the division engineer, the next, the second day after that the division engineer come and went and asked me why I stopped the gang, and I said I got a filing it is my land, I pay taxes, it is mine, the division engineer said it was my place to get a law-suit on my hands, and I said Well, I don't care for a law-suit, I think I got a right, so he says The best what you can do is to stay down,—and I say It make no difference about that.

Q. Did you show the engineer the patent?

A. Yes I showed it.

Q. Then he went off?

A. He said my patent was good.

Motion by Mr. Avery to strike what the engineer said about his patent as incompetent. Motion sustained.

Recross-examination:

Q. When was this you have been just telling about, this trouble?

A. It was just after I stopped them coming.

Q. Soon after that this suit was brought?

A. No, the suit comes up this summer.

Q. After you had this trouble, the suit was brought?

A. Yes.

35 Redirect-examination:

Q. Have you always paid the full taxes on this land?

A. Yes.

Q. No deduction for right of way?
A. No.

Witness excused.

Mr. AVERY: It is stipulated that the plaintiff has paid taxes upon the right of way through this land since 1886, and that the defendants since said date have paid taxes upon the land under the description by subdivision contained in the patent.

Defendant rests.

Plaintiff rests.

Mr. Avery moves for a judgment at this time in favor of the plaintiff, ask- to have the case withdrawn from the jury and the rendition of a judgment in favor of the plaintiff.

Argument on motion for judgment continued until 5 o'clock.

9 A. M., FRIDAY, *November 23rd.*

Argument of case resumed.

After argument of case is finished, the court says:

As there is no fact in this case for the jury, I shall withdraw the case from the jury and decide it myself, but by permission of counsel, I would like to examine these authorities. If you will leave your authorities with the places marked, I will look over them.

(To jury:) You will be discharged from the further consideration of this case gentlemen, and you will take your seats in the body of the court-room.

36 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* AUGUST HASSE ET UX., Defendants.	No. 2892. Exceptions to Findings of Fact and Judgment of the Court.

Now comes the defendants in the above-entitled action and except to the findings and judgment of the court which has been filed without paragraphing or numbering and signed by the court on the 11th. day of January 1901, and the defendants' exceptions are to each and every part thereof because the same and no part thereof is supported by the evidence but is contrary thereto. And said defendants except to the judgment of the court rendered herein because the same and every part thereof is contrary to law and is not founded upon a legal conclusion from the facts found, and because the judgment of the court from the facts proven should have been in favor of the defendant and against plaintiff.

PRUYN & SLEMMONS,
Attorneys for Defendants.

Due and legal service of above exceptions to findings and judgment of the court in the above-entitled cause accepted and copy received this 12th. day of January 1901.

CARROLL B. GRAVES,
Attorney for Plaintiff.

37 In the Superior Court of the State of Washington in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
AUGUST HASSE and —— HASSE, His Wife, Defendants.

No. 2892. Findings of Fact and Conclusions of Law.

Come now August Hasse and —— Hasse his wife, the defendants above named, and propose the following findings of fact and conclusions of law, and request the court to make and find the same before any findings of fact or conclusions of law are made or found by the court.

The court from the evidence in this case finds the following facts, to-wit:

1st. That the defendant August Hasse and —— Hasse are husband and wife.

2nd. That the defendant August Hasse settled upon the tract of land a portion of which is in controversy in this action and made homestead application there for on May 24th. 1883. That said defendant made final homestead proof on July 12th. 1888, and patent issued from the United States therefor to August Hasse one of the defendants herein on September 27th. 1889.

3rd. That the defendant August Hasse and his wife and family have ever since said settlement in 1883 lived upon said tract — land, and they enclosed the same with a fence in 1883 and constructed thereon a dwelling house and other buildings and cultivated and improved a portion of the land in controversy in this action, and for more than fifteen years preceding the bringing of plaintiff's action said defendants held the notorious exclusive, absolute, uninterrupted, continuous adverse and hostile possession under color of title and claim of right to all and every part of the land alleged in plaintiff's complaint to be wrongfully withheld by these defendants from the plaintiff in this action.

4th. That in the year 1886 the Northern Pacific railroad surveyed their line of railroad through said premises, and during said year said railroad company did with force and violence and with a great crowd of men break down the fences enclosing said land and entered upon the same and constructed said railroad across the cultivated, improved and enclosed lands of said defendants, and without permission of these defendants and against their will and wish,

and without compensating them for the injury to the improvements and cultivation of said land, or without condemning the same for their right of way, and have ever since occupied five and one
38 half feet from the center of the main track on the north side, and five and one half feet from the center of the side track on the south side and no more. And plaintiff sought in this action to eject the defendants from all the land that the defendants occupied within two hundred feet on each side of the center line of the main track of the Northern Pacific railroad where it runs through the defendant's said land.

5th. That the plaintiff's grantors, the Northern Pacific Railroad Company previous to the year 1896 never had designated, marked out nor located their right of way granted them by act of Congress approved July 2, 1864, through or across or in the neighborhood of the lands in controversy.

6th. That said Northern Pacific Railroad Company nor the grantee herein has never occupied any other portion of said tract of land than in these findings set out, and the defendant has always maintained an enclosure around the same, and the Northern Pacific Railroad Company have always maintained cattle guards where their line runs through the outside fences of said tract,

And the court finds as conclusions of law :—

1st. That the plaintiff's cause of action is barred by the statute of limitations.

2nd. The Northern Pacific Railroad Company's grant of right of way approved by act of Congress July 2nd. 1864 not having been designated, located and marked out by said company before the defendant settled upon, fenced and improved the land in controversy and obtained a homestead filing thereon, they had no right by virtue of their grant of right of way to forcibly intrude upon the enclosed and cultivated fields of another without compensating the defendants therefor, and they cannot now claim the full width of their grant of right of way over said tracts of land by virtue of their forcible trespass thereon in locating the same, and if said company or its grantees and successors in interest desire to use any more of said lands for railroad purposes they must condemn the same and pay the defendant compensation therefor before taking the same.

3rd. That plaintiff is entitled to take nothing by its said action and defendants recover their costs.

Done in open court this 10th. day of January 1901.

—— ——, *Judge.*

39 The above and foregoing proposed findings of facts and conclusions of law were presented, proposed and requested by defendant immediately after the decision of the court and the court refused to make the foregoing findings of fact or conclusions of law or either of them, to which refusal defendants excepted and exception was allowed. Defendants especially excepted to the failure of the court to find each of said proposed findings of fact and

each of said proposed conclusions of law, which exceptions were allowed by the court.

Dated this 10th day of January, 1901.

JOHN B. DAVIDSON, *Judge.*

40 *Certificate.*

I, Frank H. Rudkin, now presiding judge in and for the superior court of Kittitas county, in and for the State of Washington, in which court was tried the above and foregoing action, to-wit: The Northern Pacific Railway Company, plaintiff against August Hasse, *et ux.*, defendants, No. 2892, before the Honorable John B. Davidson, then the judge of said court, do hereby certify:

That the matters and proceedings embodied in the foregoing statements of fact are matters and proceedings occurring in the cause, and the same are hereby and thereby made a part of the record herein and therein.

I further certify that the said statement of facts contains all the material facts, matters and proceedings heretofore occurring in the cause, and not already a part of the record herein and therein.

I further certify that the foregoing statement of facts contains all the facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein. That the said statement of facts contains all the oral evidence and all the exhibits offered or received, and all the evidence offered, admitted or introduced at the trial.

I further certify that the foregoing statement of facts was served within the time authorized and required by law. That the said statement of facts was filed before the same was served; that the same was served after it was filed and within the time required by law. That no amendments have been proposed or exceptions interposed to said statement of facts by defendants as aforesaid. That the attorneys for the plaintiff have had due and timely notice of the settlement and certifying of said statement of facts.

Done in open court this 14th day of May A. D. 1901.

FRANK H. RUDKIN, *Judge.*

Endorsement: # 2892. Filed Feb. 5 1901 H. W. Hale, clerk.

41 *Homestead Certificate No.* 234, *Application* 159.

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at North Yakima Washington Territory, whereby it appears that, pur-

suant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of August Hasse has been established and duly consummated, in conformity to law, for the south half of the north west quarter and the lot numbered three of section four in township nineteen north of range sixteen east of Willamette meridian in Washington Territory containing one hundred and twenty-one acres and sixty four hundredths of an acre according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general:

Now know ye, that there is, therefore, granted by the United States unto the said August Hasse the tract of land above described: to have and to hold the said tract of land, with the appurtenances thereof, unto the said August Hasse and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Benjamin Harrison, President [SEAL.] of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty seventh day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

By the President:

BENJAMIN HARRISON,
By ELLEN MACFARLAND,
Ass't Secretary.
J. M. TOWNSEND,
Recorder of the General Land Office.

Recorded, vol. 1, page 205.

42 Endorsement: #2892. Def'ts' Ex. 2. N. P. Ry. Co. *vs.* A. Hasse *et ux.* 11/22/00.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

I hereby certify that the within instrument was filed for record, on the 23 day of Dec. 1889 at 2 o'clock and 30 minutes p. m., at the

request of John Vocke and recorded in Book A of the Record of Patents of Kittitas County, State of Washington on page 49,

H. M. BRYANT,
Auditor & Recorder,
By W. H. KAUP, *Deputy*.

43 NORTHERN PACIFIC RAILWAY COMPANY, Respondent, vs. AUGUST HASSE ET AL., Appellants. } No. 3953. Filed April 17, 1902.

Action in ejectment by the Northern Pacific Railway Company, plaintiff, against Hasse and wife, defendants.

The complaint is in the ordinary form and alleges the grant of a right of way of 400 feet, under the act of Congress of July 2, 1864, 13 Stats. at Large, at page 365; that the defendants are in possession of portions of such right of way on each side of the constructed railway line, which have not been used by the company heretofore for its right of way, and that such possession is wrongful. The answer alleged title in the defendants by adverse possession. At the trial of the cause the facts were undisputed and, in substance, as follows: That defendants settled upon the premises on May 27, 1883, under a homestead application, made final proof in the year 1888, and received a patent therefor on the 27th day of September, 1889; that prior to the year 1886 defendants had constructed substantial improvements including their dwelling house and a substantial portion of the tract was inclosed and cultivated; that, in the year 1886, the plaintiff's predecessor, the Northern Pacific Railroad Company, constructed its line of road through the premises; that at the time of the entry of the company upon said premises for construction of its line of road, it broke the inclosure of appellants and entered upon cultivated land during the temporary absence of defendants; that thereafter it erected crossings joining the exterior fences of appellants as the line ran through, and has since maintained such crossings; that appellants have maintained their complete inclosure of the premises and farmed and cultivated all the land up to the constructed line, which has ditches upon each side of the
44 track, until the commencement of this action in June, 1900; that defendants have paid the taxes on the entire premises without any deduction for right of way ever since final proof was made; and it is also shown that the railway company has paid taxes on its entire right of way. Upon these facts the superior court withdrew the cause from the jury and determined as a matter of law that judgment must go for plaintiff. From such judgment in favor of plaintiff, defendants have appealed.

The error assigned is in entering judgment for defendants. It is urged by counsel for defendants that the plea of the statute of

limitations should have been sustained and this is the vital question in the controversy. It will be observed that defendants in 1886, at the time the entry of the plaintiff was made upon the right of way through the premises, were in actual possession under a homestead application with an inclosure and improvements. The manner in which plaintiff's predecessor entered was technically forcible. The fencing and improvements certainly belonged to the defendants. In Flint etc. Ry. Co. *v.* Gordon, 41 Mich. 420, the court declared:

"The improvements on the land are certainly his own, and if those or any portion thereof are appropriated, he is entitled to compensation."

But the facts show that the company actually entered upon and has occupied only so much of the right of way as is in actual use for the operation of its line. The defendants have occupied and been in open possession under a claim of right of the area of land now in controversy since 1883, and for over ten years had a patent conveying title without reservation. The position assumed by counsel for plaintiff is that the statute of limitations does not run against the right of way granted to plaintiff. Upon this proposition the authorities do not seem to agree very well. Among those supporting the contention of plaintiff, as fairly illustrating its position, may be mentioned

Union Pacific Ry. Co. *v.* Kindred, 23 Pac. 112;
Slocumb *v.* Chicago etc. Ry. Co. 11 N. W. (Ia.) 641;
45 Railway Co. *v.* Telford's Extrs., 14 S. W. 776;
Noll *v.* Railroad Co., 32 Ia. 66;
Southern Pacific Co. *v.* Hyatt, 64 Pac. (Cal.) 272.

And it is insisted that the case of Northern Counties Investment Trust *v.* Enyard, 64 Pac. 516, determined by this court, is decisive in favor of plaintiff. It is true that the expressions in the latter case give much force and color to the argument. We think upon further review and consideration of the question that the court went too far in its acquiescence in the reasoning of some of the authorities before it at the time. In that case it was said, upon the facts found by the trial court:

"The uses for the right of way in connection with the operation of the railroad may be many. It may require a use for additional stations or side tracks. The company must so use its right of way as to reasonably prevent the communication of fires in the operation of its engines. Many of these uses, it will be observed, need not necessarily be made by the company when its line is first constructed. They must all be regarded, however, as in contemplation of the grant of the right of way. The clearing, cultivation and fencing of a portion of the right of way not in use at the time would not seem to be inconsistent with the continuing rights of the company. We do not think the acts of possession of appellant's grantors were such as to notify the company of an adverse claim to the strip of land in

controversy. Such occupancy and use by appellant may be regarded as permissive. We think upon this ground alone appellant had failed to show sufficient title to maintain its action. Arriving at this conclusion it is not necessary to discuss some other important objections argued by counsel for respondents."

But the facts in the case differ somewhat from those now under consideration. There the owners of the land granted 400 feet of right of way to the Northern Pacific Railroad Company. The company thereafter located its line of road across the premises and continued to operate the same. Thus the entry in that case was by the consent of the grantor and it was observed:

"It would seem, at any rate, to require some act upon the part of the owner of the servient estate which actually prevents the use of the right of way when required for the purposes of the railroad company, to give notice of adverse claim of right."

In the present case the attitude of the parties has been hostile from the inception of the right. But we do not think upon principle and what we now regard as the better authority that the right of way of a railroad company is excepted from the running
46 of the statute of limitations in this State. The same contention was made in the case of Northern Pac. R. R. Co. *v.* Ely, 65 Pac. (Wash.) 555. It was there observed:

"It is the contention of the appellant that the statute does not run against it, for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner; that the appellant's successor having been the true owner, and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and consequently that the statute of limitations did not apply. The statute of limitations, we think, is not based upon such a thought, but is purely and essentially a statute of repose, in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and this is true, even though he may have originally entered under a void grant or sale, But his claim ripens into a perfect title, and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washb. Real Prop. (4th ed.) p. 164: 'The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions,

although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate or transfer the title.' That the statute of limitations is a statute of repose has been decided by all modern authority, including many decisions from this court. See Wickham *v.* Sprague, 18 Wash. 466."

See also:

Railroad *v.* O'Connor, 154 Ill. 553;
Matthews *v.* Lake Shore etc. Ry. Co., 67 N. W. 1111;
Gregory *v.* Knight, 50 Mich. 61;
Coleman *v.* Railroad Co., 64 Mich. 160;
City of Big Rapids *v.* Comstock, 65 Mich. 78;
Donahue *v.* Illinois Central R. R. Co., 46 N. E. 714;
Illinois Central R. R. Co. *v.* Houghton, 18 N. E. 301.

The statute for the recovery of real property or the possession thereof is section 4797, 2 Bal. Code, as follows:

"The period prescribed in the preceding section for the commencement of actions shall be as follows:—

Within ten years,—

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for
47 such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action."

Section 4807, *id.* is as follows:

"The limitations prescribed in this chapter shall apply to actions brought in the name of the State, or any county or other public corporation therein, of for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed."

It may be clearly observed that under this statute there is no exception in favor of the State or public rights saving them from the application of the statute.

The judgment is reversed with direction to the superior court to enter judgment in favor of appellant dismissing the action.

REAVIS, *C. J.*

We concur:

WHITE, *J.*
FULLERTON, *J.*
HADLEY, *J.*
ANDERS, *J.*
MOUNT, *J.*
DUNBAR, *J.*

Endorsment: Filed Apr. 17 1902. C. S. Reinhart clerk. F. S. Guyot dep.

48 In the Supreme Court of the State of Washington, Tuesday, May 20, 1902.

NORTHERN PACIFIC RAILWAY Co., Respondent,
vs.
AUGUST HASSE ET AL., Appellant-. } No. 3953. Judgment.

This cause having been heretofore submitted to the court, upon the transcript of the record of the superior court of Kittitas county, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 20th day of May, A. D. 1902, on motion of Pruyn & Slemmons, of counsel for appellant, considered, adjudged, & decreed, that the judgment of the said superior court be, and the same is, hereby reversed with costs; and that the said August Hasse *et al.* have and recover of and from the said Northern Pacific Railway Company the costs of this action taxed and allowed at fifty-five & 90/100 dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said superior court for further proceeding, in accordance with the opinion herein filed.

49 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
AUGUST HASSE ET UX., Defendants in Error. } Petition for Writ of Error and Assignment of Errors.

Now comes The Northern Pacific Railway Company a corporation, plaintiff in error, and prays that a writ of error in the above entitled cause may issue from the Supreme Court of the United States to the supreme court of the State of Washington, to review a certain judgment entered in the said supreme court of the State of Washington on the 20th day of May, 1902, in favor of said August Hasse *et al.*, defendants in error, and against the said Northern Pacific Railway Company, plaintiff in error, reversing a judgment of the superior court of Kittitas county, State of Washington, in favor of said plaintiff in error and against the defendants in error, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of the State of Washington to the great damage of the said plaintiff in error, and the said Northern Pacific Railway Company, plaintiff in error, assigns the following errors in the rendition of said judgment by the supreme court of the State of Washington which it will urge in said Supreme Court of the United States:

1. The court erred in reversing the judgment of the superior court of the State of Washington in and for the county of Kittitas.

50 2. The court erred in holding and deciding that any portion of the right of way granted by that certain act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," to the Northern Pacific Railroad Company, could be acquired by adverse possession and occupation of the defendants in error under the statutes of Washington.

3. The court erred in holding and deciding that any portion of the right of way in controversy was lost by the Northern Pacific Railway Company or its predecessor in interest, the Northern Pacific Railroad Company, by adverse possession, occupation and improvement thereof by said defendants in error.

4. The court erred in denying the title of the Northern Pacific Railway Company to the premises in controversy founded upon the grant by the United States to the Northern Pacific Railroad Company, the predecessor in interest of said Northern Pacific Railway Company.

5. The court erred in holding and deciding that any portion of the right of way in controversy could be alienated by the Northern Pacific Railway Company or its predecessor in interest, the Northern Pacific Railroad Company.

6. The court erred in holding that the Northern Pacific Railway Company was barred under the statutes of the State of Washington from recovering possession of the premises in controversy.

7. The court erred in its judgment wherein and whereby it held that the defendants in error had the right to use and occupy the premises in controversy notwithstanding the grant thereof under the said act of Congress of July 2, 1864, to the said Northern Pacific Railroad Company, the predecessor in interest of the plaintiff in error.

51 And plaintiff in error prays that said writ of error may be allowed for the correction of the errors complained of, and for the reversal of said judgment, and that a due and authenticated transcript and record of the proceedings upon which said judgment was rendered, together with all things concerning the same may be sent to said Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY,
By B. S. GROSSCUP, *Its Attorneys.*

The writ of error herein prayed for is allowed this 24th day of July, 1903.

MARK A. FULLERTON,
Chief Justice and Presiding Justice of the Supreme Court of Washington.

Endorsement: 3953 Filed Jul- 24 1903 C. S. Reinhart clerk. F. S. Guyot dep.

52 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
AUGUST HASSE ET UX., Defendants in Error.
} Bond on Writ of Error.

Know all men by these presents, that we, the Northern Pacific Railway Company a Wisconsin corporation, as principal, and A. F. Albertson and T. B. Wallace of the city of Tacoma, Pierce county, Washington, as sureties, are held and firmly bound unto August Hasse *et ux.*, defendants in error, in the full and just sum of five hundred ($500.00) dollars to be paid to the said August Hasse *et ux.*, their heirs, executors, administrators successors and assigns, to which payment, well and truly to be made, the said principal hereby binds itself, its successors and assigns, and the said sureties hereby bind themselves, their and each of their heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated, this 24th day of July in the year of our Lord one thousand nine hundred and three.

Whereas, lately, in the supreme court of the State of Washington in a suit pending in said court between Northern Pacific Railway Company, plaintiff and respondent, and August Hasse *et ux.*, defendants and appellants, judgment was rendered against the said plaintiff and respondent, Northern Pacific Railway Company, and the said plaintiff and respondent having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid cause, and the citation directed to the said August Hasse *et ux.*, citing and admonishing them to be and appear at the Supreme
53 Court of the United States, at Washington in the District of Columbia, on or before the 22nd day of September 1903.

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By G. H. PLUMMER, *Agent and Att'y in Fact.*
A. F. ALBERTSON.
T. B. WALLACE.

Witnesses:

A. G. AVERY.
S. J. PRITCHARD.

STATE OF WASHINGTON, } ss:
County of Pierce, }

A. F. Albertson and T. B. Wallace being first duly sworn each for himself and not one for the other, deposes and says:

That he is one of the parties who made and executed the above and foregoing bond as surety for and on behalf of The Northern Pacific Railway Company, plaintiff in error in the case mentioned therein, and for the purpose of effecting and perfecting a writ of error therein; that he is a resident of the county of Pierce, State of Washington, and is worth the sum of five hundred ($500.00) dollars over and above all debts and liabilities, in separate property within the State of Washington, exclusive of property exempt from execution.

[NOTARIAL SEAL.]

A. F. ALBERTSON.
T. B. WALLACE.

Subscribed and sworn to before me this 24th day of July, 1903.

S. J. PRITCHARD,
Notary Public in and for the State of Washington,
Residing at Tacoma, Washington.

The foregoing bond is approved as to form and sufficiency.

MARK A. FULLERTON,
Chief Justice and Presiding Justice of the Supreme Court of the State of Washington.

Endorsement: 3953. Filed Jul- 24 1903. C. S. Reinhart clerk. F. S. Guyot, dep.

54 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between Northern Pacific Railway Company, plaintiff and respondent, and August Hasse and —— Hasse his wife, defendants and appellants, wherein was drawn in question the validity of a statute and an authority exercised under the United States, and the decision was against the validity thereof, and where was drawn in question a title, right, privilege, and immunity claimed under a statute of the United States, and the decision was against the title, right, privilege, and immunity claimed under such statute, a mani-

fest error hath intervened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties in this behalf, do command you, of judgment be therein given, that then, under your seal, distinctly find openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 24th day of July, in the year of our Lord one thousand nine hundred and three.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

The above writ is hereby allowed.
MARK A. FULLERTON,
Chief Justice of the Supreme Court of Washington.

[Endorsed:] 3953. Filed Jul- 24 1903 C. S. Reinhart, clerk. F. S. Guyot, dep.

Citation.

United States of America to August Hasse and —— Hasse, his wife, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein The Northern Pacific Railway Company is plaintiff in error and you and each and all of you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Mark A. Fullerton, chief justice of the supreme court of the State of Washington, this 24th day of July in the year of our Lord one thousand nine hundred and three.

MARK A. FULLERTON,
Chief Justice of the Supreme Court of the State of Washington.

58 UNITED STATES OF AMERICA, } ss:
District of Washington, }

I, C. B. Hopkins, United States marshal for the district of Washington, do hereby certify that I received the annexed citation on the seventh day of August, 1903, and on the eighth day of August, 1903, duly served the same upon Edward Pruyn and Arthur Slemmons, attorneys at law practicing under the firm name of Pruyn & Slemmons, attorneys of record for August Hasse and —— Hasse, his wife, by delivering to and leaving with the said Edward Pruyn and Arthur L. Slemmons, and to each of them, personally, a true copy thereof, at their office in Ellensburg, Kittitas county, Washington.

Dated at the city of Tacoma, the tenth day of August, 1903.

C. B. HOPKINS, *Marshal,*
By THOMAS N. MORRIS, *Deputy.*

Marshal's fees & expenses 13.60.

59 [Endorsed:] 3953 Filed Aug. 11 1903 C. S. Reinhart, clerk. F. S. Guyot, dep.

60 In the Supreme Court of the State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent,
vs.
AUGUST HASSE ET AL., Appellants. } No. 3953.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full true and correct transcript of the record in the above-entitled cause. That in pursuance of the writ of error heretofore filed in this cause I herewith transmit the said record together with the original writ of error and the original citation to the Supreme Court of the United States, and I further certify that there *has* been deposited in my office for the use and benefit of the defendant in error copies of the writ of error herein filed.

In testimony whereof I hereunto set my hand and affix the seal of said court at Olympia this the 24th day of August, 1903.

[Seal of the Supreme Court, State of Washington.

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 19,072. Washington supreme court. Term No. 118. Northern Pacific Railway Company, plaintiff in error, *vs.* August Hasse and —— Hasse, his wife. Filed September 19th, 1903. File No. 19,072.